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Supreme Court of the United States

October Term 1973

No. 73-938

COX BROADCASTING CORPORATION, et al.,

Appellants,

-vs-

MARTIN COHN,

Appellee.

On Appeal from the Supreme Court of Georgia

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

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INTEREST OF THE STATE OF GEORGIA

The "right of privacy" has been defined as:

> ". . . the right to be free from the unwarranted appropriation or exploitation of one's personalty, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. The right of privacy has also been defined as the right to be let alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned." 62 Am. Jur. 2d, *Privacy* § 1 (1972).

This Court has referred to the "right of privacy" which the citizens of this country enjoy as being "one of the unique values of our civilization." See *McDonald v. United States*, 335 U.S. 451, 453 (1948). It has spoken of the right as being

of "the very essence of constitutional liberty," declaring its protection to be just as imperative as is the protection of those other rights we call "fundamental." See *Harris v. United States*, 331 U.S. 145, 150 (1947). Since the State of Georgia, through *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905), was the first American jurisdiction to recognize the right as one for whose infringement the law will give redress, it can come as no surprise that Georgia is in complete accord with the high value which the Court has placed on this personal freedom of our citizens. Having championed this protection of the individual citizen's liberty and sensibility in the past, Georgia desires to prevent its erosion in the present. This is no less so simply because the attack upon this fundamental right is launched in the name of "freedom of the press" or "freedom of speech." It is in this light that we submit that the State of Georgia has an interest in upholding the case and statutory law it has developed in vindicating its citizens' right to privacy. This State law is under attack in the case at bar. Additionally, the case at bar appears to place in issue a State statute which not only protects the privacy of the individual, but also serves the salutary public purpose of facilitating the reporting and prosecution of one of mankind's most loathsome crimes—the crime of rape. For this reason too the State of Georgia has a vital interest in this Court's adjudication of the case at bar.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported in *Cox Broadcasting Corporation v. Cohn*, 231 Ga. 60, 200 S.E.2d 127 (1973). The additional written opinion of that court denying Cox Broadcasting Corporation's motion for rehearing is set forth immediately following the initial decision. See 231 Ga. at pp. 68-69, 200 S.E.2d at pp. 133-134.

JURISDICTION

Appellants (Cox Broadcasting Corporation, et al.) have invoked this Court's jurisdiction under 28 U.S.C. § 1257 on the ground that it is an appeal from a final judgment of the Supreme Court of Georgia in a case which has drawn into question the validity under the Constitution of the United States of a State statute, to wit: Ga. Laws 1968, pp. 1249, 1335 (Ga. Code Ann. § 26-9901). On February 19, 1974, the Court entered an order postponing the question of jurisdiction to the hearing of the case on the merits. For reasons which will be more fully detailed in the argument portion of this brief, it is the position of the State of Georgia that jurisdiction is lacking because (1) the judgment of the Supreme Court of Georgia from which the appeal is taken is not a "final order" within the meaning of 28 U.S.C. § 1257, and (2) that the State statute alleged to have been drawn into question is in fact only tangentially involved and hence not a proper basis for an appeal under 28 U.S.C. § 1257(2).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Tangentially involved to the extent that it is reflective of the State's policy with respect to the right of privacy of a female who has been victimized by the crime of rape is Ga. Laws 1968, pp. 1249, 1335 (Ga. Code Ann. § 26-9901):

> "It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor."

Also involved are the following provisions of the United States Constitution:

U. S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U. S. Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U. S. Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. Constitution, Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U. S. Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U. S. Constitution, Amendment XIV, Sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257 to hear this appeal?
2. Is the right of privacy of a grieving father whose daughter died shortly following and possibly as a consequence of being raped, as applied to his right not to have his deceased daughter's name publicized and broadcast by the news media in connection with the crime, to be set at naught by virtue of the First Amendment?

STATEMENT

The factual background of the case has been set forth in considerable detail by the able briefs submitted on behalf of the Appellants and Appellees and would not appear to require any further amplification in this *amicus* brief.

ARGUMENT

1. This appeal does not fall within the purview of 28 U.S.C. § 1257 and consequently should be dismissed for want of jurisdiction.

(a) *There is no "final" judgment.*

To be reviewable by this Court under 28 U.S.C. § 1257 the judgment or decree rendered by the highest court of a State must be a *final* judgment. This Court has construed the requisite finality under the statute to be the "effective determination of the litigation," [1] or in other words an adjudication fully determining the rights of the parties so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court directed.[2] In *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948), for example, the court said:

> ". . . the requirement of finality has not been met merely because the major issues in a case have been decided and

[1] See *Market Street Railway Co. v. Railroad Commission of California*, 324 U.S. 548, 551 (1945).

[2] See *Gospel Army v. Los Angeles*, 331 U.S. 543, 546 (1947).

> only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. * * * On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate the decree is regarded as concluding the case and is immediately reviewable."

In the case at bar the decision of the Supreme Court of Georgia has not even reached the point of determining liability, much less the amount of damages. Here even more than in *Republic Natural Gas Co.* must it be said that what remains to be done cannot be described as merely "ministerial." The decision shows on its face that it is but an interim judgment with the cause having been remanded for full trial on the merits.[3] The Georgia Supreme Court in fact did but two things. It first of all held (favorable to Appellants) that the State statutory enactment which prohibits disclosure of the identity of a rape victim, i.e. Ga. Laws 1968, pp. 1249, 1335 (Ga. Code Ann. § 26-9901) does *not* give rise to a civil cause of action in favor of the victim, or in this case, in favor of the deceased victim's father. The second holding (adverse to Appellants) was that the complaint, wholly without regard to the statute, did set forth cause of action based upon an alleged invasion of Appellee's right of privacy by Appellants' broadcasting and publicizing his deceased daughter's name, identifying her as a rape victim. In remanding the case for further proceedings consistent with its opinion the Supreme Court of Georgia made it abundantly clear that it was *not* holding that any liability existed as a matter of law. In the words of that court:

> "Although the appellee's complaint in this case stated a claim for relief, the public disclosure, admitted by the appellants, did not establish liability on the part of the appellants as a matter of law. Whether the public disclosure actually invaded the appellee's 'zone of privacy,' and if so to what extent, are issues to be determined by the fact-finder. And in formulating such an issue for determination by the fact-finder, it is reasonable to require the appellee to prove that the appellants invaded his privacy with wilful or negligent disregard for the fact that reasonable men would find the invasion highly offensive." 231 Ga. at p. 64, 200 S.E.2d at p. 131.

[3] Nor can it be said that the situation resembles *Mills v. Alabama*, 384 U.S. 214, 217 (1966), where the Court held that appellate jurisdiction existed under 28 U.S.C. § 1257 in spite of the fact that the case had been remanded for further proceedings not inconsistent with the Alabama Supreme Court's decision. In *Mills* this Court carefully noted that the record indicated that under the judgment of the Alabama Supreme Court the trial on remand would have been no more than a formal gesture leading inexorably to a conviction. No such foreordained result exists in the case at bar.

It goes without saying that the questions of how these issues would be resolved and whether or not any liability at all would attach to Appellants' actions remain wholly open. Should these questions be resolved in Appellants' favor, with no liability being incurred, any and all necessity for this Court's adjudication of the constitutional issues raised will be obviated. Thus dismissal of this appeal from a judgment which is manifestly not "final" within the meaning of 28 U.S.C. § 1257 would also be in accord with this Court's long-standing policy of refraining from constitutional adjudications where they are not absolutely necessary to the decision of the case. See, *e.g. Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567, 590-591 (1957); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936). We respectfully submit that for the foregoing reasons this appeal should be dismissed for want of jurisdiction.

(b) *The State statute claimed to have been drawn into question in this case is really only tangentially involved and hence will not support an appeal under 28 U.S.C. § 1257(2).*

As we have already pointed out, the one clear *holding* of the Supreme Court of Georgia in connection with Ga. Laws 1968, pp. 1249, 1335 (Ga. Code Ann. § 26-9901) was in favor of rather than against Appellants. The court held that the statute, which prohibits and declares it to be a misdemeanor:

> ". . . to print and publish, broadcast, televise or disseminate through any other median of public dissemination . . . the name or identity of any female who may have been

> raped or upon whom an assault with intent to commit rape may have been made",

had *not* created a civil cause of action for damages in favor of the victim or anyone else. The trial court's summary judgment to the contrary was thereupon reversed. See 231 Ga. at pp. 61-62, 200 S.E.2d at p. 129.

In so holding the Supreme Court of Georgia, in its *original* opinion, expressly refrained from any adjudication of the statute's constitutionality, saying:

> "Since we rule that the statute did not create a civil cause of action, it is unnecessary for us to consider and rule on the various attacks made on the statute by the appellants." 231 Ga. at p. 62, 200 S.E.2d at p. 130.

Had the matter ended here there obviously would have been no question as to the absence of that State court adjudication of a State statute's constitutionality necessary to jurisdiction under 28 U.S.C. § 1257(2). But this initial clarity was unfortunately somewhat clouded by the language of the additional opinion which the court rendered in denying Appellants' motion for rehearing. The motion was based upon the contention that the public disclosure or publication in question was "a matter of public concern" and therefore constitutionally privileged. (A. 57-58) The Supreme Court of Georgia, concluding that the statute was declaratory of the State's public policy on the matter, thought it to be "[i]mplicit, though not explicit" in Appellants' argument that the Court should declare the statute violative of the First Amendment. 231 Ga. at p. 68, 200 S.E.2d at p. 134. The court replied to this "implicit" argument by saying that a majority of the court did not *consider* the statute to be in conflict with the First Amendment, adding that: "We *hold* that this 1968 Georgia statute is not unconstitutional. . . ." 231 Ga. at p. 69, 200 S.E.2d at p. 134.

But while the Supreme Court of Georgia may have used the word "hold" we cannot help but question whether what it said it held is in fact a holding. Appellants were manifestly not being prosecuted under this criminal statute and the court in no way modified its decision (favorable to Appellants) that it could not be the basis of any civil liability. As we see it the

statute is involved only tangentially in the sense that it is reflective of the State's public policy concerning the public disclosure of the name or identity of a rape victim. Such tangential involvement is not ordinarily sufficient to satisfy the jurisdictional requirements of 28 U.S.C. § 1257(2). See *Garrity v. New Jersey*, 385 U.S. 493, 495-496 (1967). For this reason too we think the appeal should be dismissed on jurisdictional grounds.

2. The right of privacy of a grieving father whose daughter died shortly following and possibly as a consequence of being raped, as applied to his right not to have his deceased daughter's name publicized and broadcast by the news media in connection with the crime, needs not and ought not to be destroyed by the First Amendment.

(a) *The "right of privacy" is fundamental.*

The philosophical basis of the Supreme Court of Georgia's initial American recognition of the right to privacy in *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905), was that a person's "liberty" embraces more than mere freedom from physical restraint, that to the extent that it does not interfere with the rights of another or of the public it also protects his personal sensibilities and that which might presently be referred to as his chosen "life-style." In words which ring as true today as they did in 1905:

> "When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While of course the most flagrant violation of this right would be deprivation of life, yet life itself may be spared and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor or violate public law or policy." 122 Ga. at p. 195, 50 S.E. at p. 70.

The court concluded that:

> "The right of privacy within certain limits is a right de-

> rived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this State by the constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law." 122 Ga. at p. 197, 50 S.E. at p. 71.

That it wasn't until *Pavesich* that the infringement upon an individual's right to privacy became recognized as a common law tort, is not to say that the concept isn't much older. As pointed out by Professor Roscoe Pound in *Interests of Personality*, 28 Harv. L. Rev. 343, 357 (1915):

> "In Greek law every infringement to the personality of another is . . . (contumelia); the injury to honor, the insult, being the essential point, not the injury to the body. In Roman law, injury to the person is called *injuria*, meaning originally insult, but coming to mean any willful disregard of another's personality. In consequence the beginnings of law measure composition not by the extent of the injury to the body, but by the extent of injury to honor and the extent of the desire for vengeance thus aroused, since the interest secured is really the social interest in preserving the peace."

Indeed *Pavesich* itself was in great measure brought about by the espousal of this right in the much cited law review article of Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

While judicial acceptance of the *Pavesich* decision in other jurisdictions was initially somewhat slow, it was quite generally applauded in law review articles. As Professor Pound put it:

> ". . . while the law is slow in recognizing this interest as something to be secured in and of itself, it would seem that aggressions of a type of unscrupulous journalism, the invasions of privacy by reporters in competition for a 'story,' the activities of photographers, and the temptation to advertisers to sacrifice private feelings to their individual gain call upon the law to do more in the attempt to secure this interest than merely take incidental account of infringements of it. A man's feelings are as much a part

> of his personality as his limbs." Pound, *Interests of Personality*, 28 Harv. L. Rev. 343, 363-364 (1915).

But the pace of judicial recognition was not destined to remain so slow. According to Dean Prosser:

> "Along in the thirties, with the benediction of the *Restatement of Torts*, the tide set in strongly in favor of recognition, and the rejecting decisions began to be overruled. At the present time the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts." Prosser, *Privacy*, 48 Cal. L. Rev. 383, 386 (1960).

Mr. Nizer tells us in *The Right of Privacy*, 39 Mich. L. Rev. 526, 559 (1941), that:

> ". . . the doctrine grew up in response to a need created by the complexities of modern life."

And lest it be thought that the invasions of privacy made possible by electronic eavesdropping devices pose problems unique to the present generation, it may be pointed out that as early as 1939 Georgia's Court of Appeals concluded that an individual's right to privacy had been infringed by a hidden microphone which had been placed in her private hospital room to monitor her conversations. See *McDaniel v. Atlanta Coca-Cola Bottling Company*, 60 Ga. App. 92, 2 S.E.2d 810 (1939).

The Supreme Court of Georgia has also taken the lead in recognizing that the individual sensibilities protected by the right of privacy may in some situations include relational interests or the feelings engendered by close familial bonds. This was presaged by that court in its very initial "right to privacy" decision, *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 210, 50 S.E. 68, 76 (1905), where by way of dicta it was suggested that in a proper case the relatives of a deceased could protect the memory of their kinsman. Subsequently, in *Bazemore v. Savannah Hospital*, 171 Ga. 257, 155 S.E. 194 (1930), the parents of a malformed infant who had died shortly following his birth were held to have had *their* right to privacy infringed by the publication of their deceased son's picture in the newspaper. Accord, *Smith v. Doss*, 251 Ala. 250, 253, 37

So.2d 118, 121 (1948). This "relational interest" application of the right to privacy has been favorably commented upon in Green, *Relational Interests*, 29 Ill. L. Rev. 460 (1934). As stated by Robert Kennedy in *The Right to Privacy in the Name, Reputation and Personality of a Deceased Relative*, 40 Notre Dame Lawyer 324, 325 (1965), the concept rests upon:

> ". . . the intimacy of the relation which should give the relative a protectable interest in the name, personality and reputation of the deceased. The intimacy is such that the postmortem abuses of name, personality and reputation necessarily harm surviving relatives."

Since it is *individual* sensibilities which the "right of privacy" protects, we would submit that there is nothing at all illogical in recognizing that the individual's deepest feelings quite ordinarily include those which stem from such close familial affections as husband and wife or parent and child.

This is not to say, on the other hand, that "sensibility" is a purely subjective matter to be determined by whatever a given plaintiff personally finds offensive. As Dean Wade puts it:

> "The standard for invasion of the right of privacy is phrased in terms of the effect of the statement on the plaintiff, himself, and indicates that it must be offensive to him. But the standard is still not subjective; the courts speak of the requirement that it be offensive to a person of ordinary sensibilities." Wade, *Defamation and the Right of Privacy*, 15 Vand. L. Rev. 1093, 1111 (1962).

The protection afforded by law does not extend to supersensitiveness or agoraphobia. See *Davis v. General Finance & Thrift Corp.*, 80 Ga. App. 708, 711, 57 S.E.2d 225, 227 (1950); 62 Am. Jur.2d *Privacy* § 13; Prosser, *Privacy*, 48 Cal. L. Rev. 383, 390-391, 396 (1960).

Nor do we question the fact that the right to privacy is one which must necessarily be limited by the legitimate rights of others or of the public. This was fully recognized even in the initial *Pavesich* decision when the Georgia Supreme Court stated that:

> "It may be that there will arise many cases which lie near the border line which marks the right of privacy on the one hand and the right of another individual or the public on the other. But this is true in regard to numerous other rights which the law recognizes as resting in the individual." See 122 Ga. at p. 200, 50 S.E. at p. 72.

While for reasons to be discussed we do *not* think it is applicable in the case at bar, one illustrative limitation of the right of privacy is that it cannot be applied so as to prohibit the publication or broadcasting of a matter which is of *legitimate* public or general interest. See, e.g. *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 204, 50 S.E. 68, 74 (1905); Annot. *Right of Privacy*, 168 A.L.R. 446, 453 (1944). This as well as other competing interests and values of both other individuals and of the public in general will almost always call for judicial "balancing" on a case by case basis, and we shall deal with the "balancing" involved in the case at bar in a subsequent portion of this brief.

Before departing from this threshold discussion of the right to privacy, however, it is of utmost importance to note that while its precise boundaries may not be entirely clear, the right is in principle at least, widely recognized to be one which is not only constitutionally protected but which rises to the level of a "fundamental right." As is not infrequently the case regarding such "fundamental rights," the citizen's privacy has been deemed to have been secured by multiple provisions of our Constitution. We have already mentioned that *Pavesich* refers to the right to privacy as being part of the citizen's "liberty," and as such protected against undue governmental interference by the "due process" clause of our Constitution. See p. 10, *supra*. This, of course, involves both the Fifth and Fourteenth Amendments. This Court, as the Supreme Court of Georgia in *Pavesich*, has expressly recognized that the protection of "liberty" under these provisions is not limited to mere physical restraint but also includes the safeguarding of various rights of his personality. See *Board of Regents v. Roth*, 408 U.S. 564, 572-573 (1972); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

The right of a citizen to privacy also appears to be firmly rooted in the Fourth Amendment, which is designed, *inter alia*,

to protect: "(t)he right of the people to be secure in their persons . . . ." As this Court put it in *Davis v. United States*, 328 U.S. 582, 587 (1946), the Fourth Amendment affords.

> "protection of the privacy of the individual, his right to be let alone."

In *Harris v. United States*, 331 U.S. 145, 150 (1947), it was similarly pointed out that:

> "This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as the very essence of constitutional liberty; and the guarantee of them is as important and imperative as are the guarantees of the other fundamental rights of the individual citizen . . .' "

It has also been suggested that there is a First Amendment interest in protecting the privacy of the individual which is no less important than the protection which is provided for his "freedom of speech." A note entitled *Privacy in the First Amendment*, 82 Yale L. J. 1462 (1973), reasons that:

> ". . . if a free expression system is to be maintained, the First Amendment has an interest in protecting the privacy of the individual." *Id.* at p. 1468.
>
> "The First Amendment has an interest in protecting a broad range of speech; it has also a parallel interest in protecting a broad range of privacy." *Id.* at p. 1469.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court appears to have reached the same conclusion when it said:

> ". . . the First Amendment has a penumbra where privacy is protected from governmental intrusion." 381 U.S. at p. 483.

Griswold, of course, is also of significance in connection with the concurring opinion of Justices Goldberg, Warren and Brennan. Their views would appear to recognize both the fundamental nature of the citizen's right of privacy and the fact that it is protected by multiple provisions of our Constitution. The citizen's privacy is referred to in this concurring opinion as being among those fundamental rights protected by

the Ninth Amendment, 381 U.S. at pp. 488-494.[4] In connection with the protection under the Fourteenth Amendment's "due process" clause this concurring opinion further reminds us that:

> "The Court stated many years ago that the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'." 381 U.S. at p. 487.

In summary, we do not believe that there can be the slightest doubt as to the fact that the individual's right to privacy, which the Supreme Court of Georgia first recognized in *Pavesich*, is today to be counted as one of the most important rights which our Constitution and laws accord to the individual citizen. He has indeed a broad right to be let alone in his happiness and contentment as well as (in the case at bar) in his grief.

(b) *Freedom of Speech.*

It goes without saying that freedom of speech is also among the unique values of our civilization. Yet, we think, it is equally obvious that this fundamental value is not and cannot be any more "absolute" than is the at least equally important "right to privacy."[5] For example, "freedom of speech" has never

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[4] For the same reasons the right to property might be construed to be one of those rights reserved to the people by the Tenth Amendment.

[5] It is arguable, of course, that the "right to privacy" is of an even higher priority than freedom of speech. According to the late Professor Alexander Meiklejohn the central role and purpose of freedom of speech under the First Amendment is to enhance the operation of our particular form of government—where it is the People who govern, and where it is the agencies of government, federal and state who are *their* servants rather than vice versa. See Meiklejohn, *The First Amendment is an Absolute*, The Supreme Court Review, pp. 245, 253 (1961). Thus the speech which Dr. Meiklejohn considers to be protected by the First Amendment is that which is of "governmental importance" (i.e. having some involvement with the self-government of our citizens). See also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. 1 (1965). This view has achieved considerable support by the courts of late. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), for example, this Court spoke of our "profound national commit-

been thought of as protecting perjury, the misbranding of food or drugs, fraud and deceit, contempt of court, Hatch Act violations, the cry of fire in the crowded theater, or the numerous other oral and written declarations which society has thought necessary to disallow. Thus has it been observed that:

> "Freedom of speech under Anglo-American law has never been an absolute right, and numerous exercises of free speech (and of free press) have been subjected to inhibiting legal sanctions, both criminal and civil, almost from the beginning of our common law heritage." Leflar, *The Free-ness of Free Speech*, 15 Vand. L. Rev. 1073 (1962).

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[5] (cont'd)

ment to the principle that debate on public issues should be uninhibited, robust, and wide-open" and said:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, as we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " 376 U.S. at p. 269.

In a similar vein, recent decisions involving the "freedom of speech" of teachers have distinguished between a teacher speaking out *as a citizen on matters of public concern* (protected by the First Amendment), see, e.g. *Pickering v. Board of Education of Township Highschool*, 391 U.S. 563, 568 (1968), and a teacher speaking *as a teacher on matters not of public concern* (*not* protected by the First Amendment). See, e.g. *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1973), *cert. denied*, 411 U.S. 972 (1973).

But while "freedom of speech" (under the Meiklejohn interpretation at least) has *the proper functioning of our particular form of government* as its central purpose, it is difficult to justify even so much as *the very existence of government, regardless of its form*, if it does not perform its most basic duty of all—which is protection of the personality of its citizens. As Art. I, Sec. I, Par. II of the Constitution of the State of Georgia of 1945 (Ga. Code Ann. § 2-102) expressly recognizes:

> "Protection to person and property is the paramount duty of government . . . ."

We believe that the right of a free man to protect his private sensibilities from unwarranted invasion or publicity is an indispensible part of his personality. We agree with what Justice Stewart said about the citizen's personality in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) [concurring opinion]:

As this Court put it in *Chaplinski v. New Hampshire*, 315 U.S. 568, 571-572 (1942):

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Indeed even where the language in question clearly falls within the protective penumbra of the First Amendment (e.g. speech made as a citizen-critic upon matters of public concern), the Court has recognized the possibility of the interest in the protected speech being overbalanced by other interests. In *Pickering v. Board of Education of Township Highschool*, 391 U.S. 563, 568 (1968), for example, it was said that:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the

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[5] (cont'd)

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself is left primarily to the individual State under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

As fundamental as "freedom of speech" may also be in our constitutional scheme of things, we submit that it is really not unthinkable to suggest that in a thoughtful ordering of values the citizen's right to privacy may be of even greater importance.

> State, as an employer, in promoting the efficiency of the public service it performs through its employees."

One commentator has observed in reviewing the various exceptions and limitations of "free speech":

> "What the courts have done in these hard cases has been essentially the same as they have done in the easy mass of cases. They have weighed the social values inherent in the particular free speech, as they saw these values, against the competing interests, and have concluded that the values inherent in the competing interests were the weightier." Leflar, *The Free-ness of Free Speech*, 15 Vand. L. Rev. 1073, 1083-84 (1962).

(c) *The balancing of the fundamental rights of "privacy" and "freedom of speech" in the present case.*

Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1905), did not ignore the inevitable conflict and balancing which is inherent in the simultaneous existence of the citizen's right to privacy and his constitutional guarantees respecting freedom of speech and the press. The court observed that:

> "The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and the press. The right to speak and the right of privacy have been coexistent. Each is a natural right, each exists, and each must be recognized and enforced with due respect for the other." 122 Ga. at p. 202, 50 S.E. at p. 73.

With respect to the limitations of freedom of the press and speech the Georgia court said:

> "The right preserved and guaranteed against invasion by the constitution is therefore the right to utter, to write, and to print one's sentiments, subject only to the limitation that in so doing he shall not be guilty of an abuse of this privilege *by invading the legal rights of others.*" 122 Ga. at p. 203, 50 S.E. at p. 73 (emphasis added).

The right to privacy, on the other hand, is also limited. One of the most important limitations is that it cannot be applied

so as to prohibit the publication or broadcasting of matters *which are of legitimate public or general interest.* This too was recognized in *Pavesich.* See 122 Ga. at p. 204, 50 S.E. at p. 74. And as this Court more recently said in *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967):

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Stripped to its bare bones, Appellants' present case (disregarding its jurisdictional problems) rests squarely upon their claim that broadcasting the name of Mr. Cohn's deceased daughter on television as the victim of multiple rapes—regardless of what it did to him in his sorrow over the event—is, as this Court put it in *Time, Inc. v. Hill, supra*, "needed or appropriate to enable the members of society to cope with the exigencies of [our] period." Thus, say Appellants, their identification of the victim is privileged as a matter of legitimate public interest and concern. We not only strongly disagree, we find the argument quite incredible. Can it seriously be maintained that there is not a clear distinction between informing the public that a particular crime has been committed (along with full airing of all essential details, if need be) and the disclosure of the victim's name by the news media? We think it to be a self-evident truth that:

> "In public disclosure cases in which the plaintiff is not well-known, the First Amendment interest of the public, operating through the publisher, is satisfied by the publication of the fact or event; the First Amendment interest of the subject is satisfied if the publisher refrains from identifying him. Hence, there is no constitutional objection to preserving a tort remedy for the plaintiff if the publisher does identify him and thereby injures his privacy." Note, *Privacy in the First Amendment*, 82 Yale L. J. 1462, 1470-1471 (1973).

What possible societal interest can there possibly be in allowing WSB-TV to claw open the still fresh wounds of the rape victim's father?

Appellants seem to take the view that what constitutes a legitimate public interest or concern is a question which falls exclusively to the unfettered discretion of the leviathan news media. See, e.g., Appellants' Brief, pp. 29. Should this disaster ever come to pass it seems obvious to us that the right of the individual citizen to privacy in this country is dead. To the news media whatever they desire to print would *ipso facto* be a matter of public interest and concern. Surely in a society which prides itself in its belief in the dignity of man we can do better than this for the privacy (i.e. "liberty") of the individual citizen. The balancing, after all, is not that which must take place between the right to privacy of one citizen and the freedom of speech of another citizen. It is between the individual citizen and an aggressive and frequently insensitive communications media whose powers in many respects have come to rival those of government itself, whose actions can be almost as repressive and injurious to the personality of the individual citizen as can those of government itself, but which unlike government itself is in no way responsible to the people through the ballot. We think it is entirely open to question whether the priority to be given to the freedom of speech of these large corporate commercial enterprises is of the same level as that secured to the individual citizen.[8] We respectfully submit that it is entirely proper for the government, which *is* responsible to the people, to establish guidelines (subject, of course, to constitutional limitations) as what will and what will not be deemed to be a matter of legitimate public concern and interest—at least where the individual citizen's right to privacy is concerned. Government may do so, we submit, both through appropriate legislation or through judicial decisions. If the right of privacy is constitutionally protected, surely it can be legislatively vindicated.

In a situation quite analogous to the case at bar, i.e. *State v. Evjue*, 253 Wisc. 143, 33 N.W.2d 305 (1948), a publisher who violated a Wisconsin statute making it unlawful to publish the

[8] In a somewhat different context this Court has indicated that commercial speech is not accorded the same degree of protection as the comments of the citizen-critic concerning his governance. See *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

identity of a rape victim contended that his prosecution conflicted with his constitutional guarantees of "freedom of speech" and "freedom of the press" as well as with his "due process" and "equal protection" rights under the Fourteenth Amendment. In rejecting this contention the Supreme Court of Wisconsin gave what we believe to be the correct answer when it said:

> ". . . this statute is intended to protect the victim from embarrassment and offensive publicity which no doubt have a strong tendency to affect her future standing in society. In addition to that it is a well known fact that many crimes of the character described go unpunished because the victim of the assault is unwilling to face the publicity which would follow prosecution. The feelings of a female under such circumstances can easily be imagined . . . ." 33 N.W.2d at p. 312.
>
> "It is considered that there is a minimum of social value in the publication of the identity of a female in connection with such an outrage. Certain it is that the legislature could so find. At most the publication of the identity of the female ministers to a morbid desire to connect the details of one of the most detestable crimes known to law with the identity of the victim. When the situation of the victim of the assault and the handicap prosecuting officers labor under in such cases is weighed against the benefit of publishing the identity of the victim in connection with the details of the crime, there can be no doubt that the slight restriction of the freedom of the press prescribed by [the state statute] is fully justified." 33 N.W.2d at p. 312.

We respectfully submit that the reasoning of the Supreme Court of Wisconsin is entirely sound. *Cf. Nappier v. Jefferson Standard Life Ins. Co.*, 322 F.2d 502 (4th Cir. 1963). Nor, of course, is this protection of the victim of the crime of rape the only instance where statutes have been enacted to prevent publication of the names of those involved in a crime. Ga. Laws 1971, pp. 709, 751 [Ga. Code Ann. § 24A-3503(g)], for example, provides that:

> "The name or picture of any child under the jurisdiction of the [juvenile] court for the first time shall not be made

> public by any news media, upon penalty of contempt . . . , except as authorized by an order of the court."

If Appellants' position is correct, statutes of this genre would also seem to be doomed even though this Court has seemingly approved of a state's policy decision to keep such matters confidential. See *In Re Gault*, 387 U.S. 1, 25 (1967).

Actually, courts have protected the individual privacy of citizens involved in crime even in the absence of statute. In *Briscoe v. Reader's Digest Association*, 4 Cal.3d 529, 483 P.2d 34 (1971), the Supreme Court of California was faced with a situation where a man who had been convicted of crime some eleven years earlier, but who had since led an honorable life and assumed a respectable place in society, awoke to find his life and dreams shattered by the entirely truthful retelling of his former criminal activities in the pages of Reader's Digest. With full recognition that the central purpose of the First Amendment is to give the citizenry the most complete possible understanding of the problems with which they must deal in a self-governing society, and with full recognition that this would in many cases cover the reporting of recent events even where it might involve the publication of an individual's name or likeness, the Supreme Court of California nonetheless held that the right to privacy claim before it was one which should be resolved by the jury. In the words of that court:

> "On the assumed set of facts before us we are convinced that a jury could reasonably find that plaintiff's identity as a former hijacker was not newsworthy." 483 P.2d at p. 43.

In discussing the balancing involved between the competing interests of speech or press and the individual citizen's privacy, the court said:

> "We have previously set forth criteria for determining whether an incident is newsworthy. We consider (1) the social value of the facts published, (2) the depth of the article's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily acceded to a position of public notoriety." 483 P.2d at p. 43.

If the law, whether by statute or by judicial decision, is

permitted to protect the privacy of those who have engaged in criminal activities, surely the sensibilities of the victim can also be given some consideration. It is undoubtedly most illogical for a female who has been victimized by the crime of rape to feel a sense of shame or guilt over the matter. But illogical or not it is a fact of the real world is that they not infrequently do. Ga. Laws 1968, pp. 1249, 1335 (Ga. Code Ann. § 26-9901), which as the Wisconsin statute at issue in *Evjue* makes it unlawful to publish or broadcast the name of a rape victim, does no more than recognize this fact of life. Moreover, while affording some degree of privacy to the victim and her family, the statute also serves the salutary public purpose of facilitating the reporting and prosecution of the crime. We agree with the assessment of the Supreme Court of Wisconsin that any restriction which this might place upon the freedom of the press or free speech of the news media is of very little consequence when viewed in the light of the competing interests of the victim's right to privacy and the State's enforcement of its criminal statutes on one of the most loathsome crimes known to man.

CONCLUSION

For the reasons stated, we think that jurisdiction over this case is lacking under 28 U.S.C. § 1257. If, on the other hand, jurisdiction should for any reason be deemed to be present, we think that the decision of the Supreme Court of Georgia is clearly correct and should be affirmed. At pages 66 and 67 of their Brief, Appellants say that "Instantaneous dissemination of news in today's world of global and satellite communication through electronic means now requires more than ever an explicit enunciation of the protection afforded the press in America to publish the news . . . ." We would say that the instantaneous electronic dissemination to which Appellants refer much more urgently requires an increase in the protection which the law provides for the personal liberty of the private citizen (i.e. his right to privacy or to be let alone) against the intrusion upon his personal life by the communications media.

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